

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JUDY EARLS)	
Claimant)	
)	
VS.)	
)	
PIZZA HUT OF SE KS INC.)	
Respondent)	Docket No. 1,024,856
)	
AND)	
)	
COMMERCE & INDUSTRY INS. CO.)	
Insurance Carrier)	

ORDER

Respondent requests review of the September 29, 2006 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

Following a preliminary hearing, the Administrative Law Judge (ALJ) issued an Order directing the respondent to provide the claimant with the names of 3 physicians to treat claimant for her work-related back injury. The Order also provided that whoever the claimant chooses to be her physician would have the authority to refer the claimant for any psychological treatment as it may relate to her back injury.¹ Unfortunately, this Order does not provide any legal conclusions or analysis to justify the ALJ's Order.

The respondent requests review of this Order arguing that the ALJ erred when he apparently concluded the claimant sustained a personal injury by accident out of and in the course of her employment, and that claimant provided timely and proper notice of her

¹ The preliminary hearing was held January 25, 2006 and yet the Order was entered September 29, 2006. The record reflects no discernable reason for this 9 month delay. K.S.A. 44-534a requires preliminary hearing orders to be issued within 5 days.

alleged back injury. Respondent urges the Board to reverse the ALJ's decision and deny claimant the medical treatment she seeks.

Claimant argues that the ALJ's order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant had been employed as a restaurant manager for over a year before she contends she suffered injury to her back. She testified that 2 to 3 times a week she would unload trucks full of pizza dough that weighed 50 to 75 pounds along with other pizza ingredients and distributed them to their proper location in the store. Claimant also had to break down and dispose of the boxes in which the supplies came. She stated these activities involved constant bending and lifting and that over time, these activities bothered her back.

Claimant testified that her back pain began in January of 2005 and continued until her last day of work May 18, 2005. Claimant also testified that she reported her back injury to her district manager, Brian Tevault² on at least 5 occasions,³ and that at no time did Brian offer to send her to a doctor.⁴

Claimant stated that she ended up seeking medical treatment for her back on her own. She saw her family doctor, Dr. Phillip Bortmes, who put her on restrictions. She stated that originally her doctor did not want her to work at all, but she maintains she convinced him to let her work limited hours because she didn't want to let her employer down. Claimant would give Jenny, in payroll, her doctor slips and they would be turned into Brian. When she was given work restrictions she faxed her restrictions to Brian, but her restrictions were never honored because her help was needed, and as a result her back got worse.⁵

Dr. Bortmes noted that the claimant had a history of back pain, but his records do not indicate that these complaints are due to a work-related injury. Claimant admitted that she did not mention her pain as being work-related to the doctor because she had

² P.H. Trans. at 17.

³ *Id.* at 18.

⁴ *Id.* at 19.

⁵ *Id.* at 21.

insurance and wanted to take care of it herself.⁶ And the claimant believed Dr. Bortmes knew her back pain was work-related as he came in to the restaurant a lot and they would have conversations about her back.⁷

Claimant saw Dr. Prostic for evaluation on September 30, 2005. Based upon this evaluation, Dr. Prostic opined that the claimant during the course of her employment sustained injury to her low back aggravating pre-existing degenerative disc disease. He stated that the claimant would not have relief unless she addressed the psychological barriers she had to improvement and preferred that the claimant be evaluated by a psychotherapist and only work light duty with the ability to change position for comfort.⁸

The ALJ noted respondent's defenses to the compensability of claimant's alleged back injury but, nonetheless, granted claimant's request for medical treatment. And the ALJ expressly provided for a further referral to a psychologist, "if necessary for treatment to the back or otherwise related to [c]laimant's work injury."⁹

Although he did not expressly indicate, since the ALJ granted claimant's request for medical treatment he must have resolved the compensability issues in claimant's favor. And in reviewing the record, this Board member finds that the Order should be affirmed.

Claimant's testimony, albeit less than precise, does substantiate her claim that she suffered a series of injuries resulting in complaints of low back pain which have now been diagnosed as an aggravation of her pre-existing degenerative disc disease. No one disputed claimant's characterization of her job duties. And it is uncontroverted, at least up to this point, that claimant told her supervisor that her back complaints were due to her work activities. Moreover, the only medical evidence within the file, that of Dr. Prostic, suggests that claimant requires psychological help in order to recover from this injury. Based upon this evidence, this Board Member finds the ALJ's Order to be well supported.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.¹⁰ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to the entire Board in appeals of final orders.

⁶ *Id.* at 44.

⁷ *Id.* at 47.

⁸ *Id.*, Cl. Ex. 1 at 2-3 (Dr. Prostic's Sept. 30, 2005 report).

⁹ ALJ Order (Sept. 29, 2006).

¹⁰ K.S.A. 44-534a.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated September 29, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2006.

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge